EDITOR'S NOTE

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86-7132

No. 86-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAMES HENRY MILLER

Petitioner,

[redacted]

Plaintiff,

v.

R. D. SIMMONS, DETECTIVE;
R. W. LEARY, SHERIFF and
his DEPUTY SHERIFF JAILERS
in/for DURHAM, NORTH CAROLINA,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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proceeding in forma pauperis

33 pp

QUESTION PRESENTED

Whether a district court's order denying an indigent and incarcerated civil rights litigant's motion for appointment of counsel under 28 U.S.C. § 1915(d) is immediately appealable pursuant to 28 U.S.C. § 1291 as interpreted by Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) and its progeny.

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PETITION FOR WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

Petitioner, James Henry Miller, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fourth Circuit entered on March 26, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 814 F.2d 962 and appears as Appendix A. The opinion of the District Court is unreported and appears as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on March 26, 1987. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. § 1915(d) provides:

Proceedings in forma pauperis

. . .

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

28 U.S.C. § 1291 provides in pertinent part:

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

STATEMENT OF THE CASE

On October 2, 1984, James Henry Miller was arrested by Detective R. D. Simmons and transported to the Durham County jail which was then under the control of R. W. Leary, Sheriff of Durham County, North Carolina. At the time of the arrest, Mr. Miller was 69 years old, with a history of serious heart illnesses. On the day Mr. Miller was taken to the Durham County jail, he suffered severe chest pains and requested to see a physician and to be given medication, but his requests were refused. Instead, his medications were confiscated and put in the charge of the deputy sheriff jailers who, though the record does not reflect the jailers had any medical training, administered the drugs on a daily basis beginning the day after Mr. Miller's arrest. Mr. Miller has alleged in a sworn affidavit that medications given him in the following days were not according to his physician's schedule.

Despite numerous attempts to obtain medical help, Mr. Miller spent 12 days in the Durham County jail before a physician was allowed in to see him. The physician who finally came determined that Mr. Miller was in need of different medication. Mr. Miller was thereafter transferred to North Carolina's Central Prison and admitted to the Central Hospital. There, his previous drug intake was diagnosed as excessive and his medications were accordingly adjusted.

Mr. Miller filed suit in the Middle District of North Carolina on behalf of himself and his wife, Ollie J. Miller, against Detective Simmons and Sheriff Leary. The complaint alleged deliberate indifference to medical needs in

violation of 42 U.S.C. § 1983 and sought $200,000 in compensatory damages as well as punitive damages. After a flurry of pleadings were filed over a seven-month period, including a motion for summary judgment which was originally granted on behalf of defendants and then withdrawn pending further consideration, Mr. Miller moved for appointment of counsel pursuant to 28 U.S.C. § 1915(d).

The district court denied petitioner's motion for appointment of counsel on August 29, 1985, in an order which also accelerated the conclusion of the litigation by setting forth a November 15, 1985 discovery deadline and by requiring that summary judgment motions be filed within thirty days after the close of discovery. App. B infra at 13a. In its order, the district court concluded "the legal and factual issues involved in a claim of deliberate indifference to a serious medical need . . . are not complicated. Further, plaintiffs have demonstrated clear ability to prosecute this action in adequate fashion." App. B infra at 14a. Earlier in the same order, however, the district court concluded that "many of plaintiffs' filings are both duplicative and unnecessarily voluminous. A review of the file demonstrates that this civil action is making little progress and is, instead, developing into a morass of paper that does not facilitate resolution of the dispute between the parties." App. B infra at 12a.

Mr. Miller gave notice of appeal from the August 29 order, but the district court did not certify the appeal pursuant to 28 U.S.C. § 1292(b). On June 30, 1986, Mr. Miller was granted leave by the Fourth Circuit to proceed in forma pauperis and counsel was assigned to represent Mr. Miller on appeal.

The Fourth Circuit dismissed Mr. Miller's appeal for lack of jurisdiction. 814 F.2d 962 (4th Cir. 1987). The court held:

> Orders denying motions for appointment of counsel are not, prior to final disposition of the case in the district court, 'final decisions' of district courts as contemplated by 28 U.S.C. § 1291. Moreover, it is the view of this court that these orders are not within the parameters of the narrow exception to § 1291, articulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) and amplified by its progeny.

App. A infra at 3a. In so holding, however, the Fourth Circuit noted: "Six

Circuits have held that such orders are not immediately appealable . . . Four Circuits have held that such orders are immediately appealable." App. A infra at 3a n.4.

Mr. Miller remains imprisoned in a Springfield, Missouri federal correctional facility.

REASONS FOR GRANTING THE WRIT

I. WHETHER AN ORDER DENYING APPOINTMENT OF COUNSEL IS APPEALABLE PURSUANT TO 28 U.S.C. § 1291 IS A RECURRING AND UNSETTLED ISSUE THAT HAS DIVIDED THE COURTS OF APPEALS WHICH NEED THIS COURT TO PROVIDE GUIDANCE.

"Although 28 U.S.C. § 1291 vests the courts of appeals with jurisdiction over appeals only from 'final decisions' of the district courts, a 'decision final within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case.'" Mitchell v. Forsyth, __ U.S. __ 105 S.Ct. 2806, 2815, 86 L.Ed.2d 411 (1985) (quoting Gillespie v. United States Steel Corp., 379 U.S. 148, 152 (1964)). Thus, a decision of a district court is appealable if it falls within "that small class which finally determines claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). This Court has recently stated that for an order to be appealable pursuant to Cohen, it must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 375 (1981) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978)).

The Fourth Circuit, describing the Cohen doctrine as an exception to § 1291 rather than a practical construction of § 1291 as this Court has construed it,[1] held that none of the three criteria articulated in Firestone had been met in this case. The rationale and holdings of the Fourth Circuit, however, are at odds with previous decisions of this Court and of other circuits.

Even though the order denying counsel included within it strict

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[1] See e.g., Firestone Tire & Rubber Co., 449 U.S. at 375.

guidelines for completing discovery and dispositive motions, thus readying the case for trial, the Fourth Circuit refused to view the order as one which conclusively determines the issue in question because the petitioner's motion was denied without a statement that the denial was with prejudice. App. A infra at 8a. Cf. App. B infra at 14a. But see e.g., Moses H. Cone Memorial Hospital v. Mercury Construction Co., 460 U.S. 1, 12-13 (1983) (because "there is no basis to suppose that the district judge contemplated any reconsideration of his decision to defer to the parallel state suit," that decision satisfies the first part of the collateral order doctrine); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. at 375-76 (order denying disqualification of attorney "meets the first part of the 'collateral order' test . . . because the only issue is whether challenged counsel will be permitted to continue his representation").

The Fourth Circuit also held that the second part of the collateral order test was not met because determining the complexities of the factual issues would "enmesh" the court in consideration of issues not wholly separate from the merits of the case. App. A infra at 9a. But see e.g., Mitchell v. Forsyth, __ U.S. ___, 105 S.Ct. 2806, 2816-17, 86 L.Ed.2d 411 (1985) (where claim of qualified immunity is "conceptually distinct from the merits of the plaintiff's claim," it is separate from and collateral to the claim even though "resolution of these legal issues will entail consideration of the factual allegations that make up the plaintiffs' claim"); Roberts v. United States District Court for the Northern District of California, 339 U.S. 844, 845 (1950) (the denial by a district court of a motion to proceed in forma pauperis, the consideration of which requires a determination of whether the claim has merit, is an appealable order).

Finally, the Fourth Circuit concluded that the denial of counsel question is effectively reviewable on appeal from a final judgment. App. A infra at 10a-11a. But see e.g., Robbins v. Maggio, 750 F.2d 405, 413 (5th Cir. 1985) ("the potential loss of a claim by a pro se civil rights litigant involves an 'asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial'"); Hudak v. Curators of University of

Missouri, 586 F.2d 105, 106 (8th Cir. 1978), cert. denied 440 U.S. 985 (1979) (the harm that denial of appointment of counsel "may cause can be irreparable on appeal of the final judgment").

The Fourth Circuit's decision in this case is in all regards in direct conflict with the consistent decisions of the Fifth Circuit and Eighth Circuit on the same issue. For example, five months before the Fourth Circuit's decision in this case, the Fifth Circuit followed a line of previous decisions and held that a ruling, before final judgment was entered, which denied an indigent litigant's motion for appointment of counsel is appealable as a final order pursuant to 28 U.S.C. § 1291. Jackson v. Dallas Police Department, 811 F.2d 260, 261 (5th Cir. 1986). See also Robbins v. Maggio, 750 F.2d 405, 409-13 (5th Cir. 1985); Caston v. Sears Roebuck & Company, 556 F.2d 1305, 1309 (5th Cir. 1977). In Robbins v. Maggio, the Fifth Circuit painstakingly considered the three factors set forth in Firestone to determine whether the collateral order doctrine should apply and concluded that in a case such as this one, where a pro se and incarcerated litigant seeks appointment of counsel pursuant to 28 U.S.C. § 1915(d), the denial of a request for counsel is appealable pursuant to the collateral order doctrine.

A consistent series of decisions of the Eighth Circuit are also in direct conflict with the Fourth Circuit's decision in this case. In Slaughter v. City of Maplewood, 731 F.2d 587, 588 (8th Cir. 1984), the Eighth Circuit had "little hesitation in concluding that the district court's order denying Slaughter appointment of counsel is immediately appealable under Cohen's collateral order exception. . . ." See also Hudak v. Curators of University of Missouri, 586 F.2d 105, 106 (8th Cir. 1978), cert. denied 440 U.S. 985 (1979); Peterson v. Nadler, 452 F.2d 734 (8th Cir. 1971). Recently, the Eighth Circuit followed Slaughter in a case involving a prison inmate who had filed a civil rights suit under 42 U.S.C. § 1983. Sours v. Norris, 782 F.2d 106 (1986). In Sours, the pro se litigant appealed from the district court's order denying his motion for preliminary injunction and for appointment of counsel. 782 F.2d at 106. Although the Court did not explicitly address the appealability issue, it clearly considered the order denying appointment of

counsel appealable pursuant to Slaughter when it decided to "remand the case to the district court for redetermination of Saur's motion for appointment of counsel in light of the considerations set forth in Slaughter . . . ." 782 F.2d at 107.

Although the Fifth and Eighth Circuits are the only circuits consistently in direct conflict with the decision of the Fourth Circuit in this case, the question presented here has resulted in inconsistent decisions by panels in four other circuits thus demonstrating the need for this Court's guidance on the issue.

The Ninth Circuit in a lengthy and well-reasoned decision held that the denial of a Title VII plaintiff's motion for appointment of counsel is appealable under the collateral order doctrine. Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301 (9th Cir. 1981). Accord Ivy v. Board of Regents of University of Alaska, 673 F.2d 266 (9th Cir. 1982). Cf. Rincon Band of Mission Indians v. Escondido Mutual Water Company, 459 F.2d 1082 (9th Cir. 1972) (order determining that United States need not furnish legal representation to plaintiff Indians under 25 U.S.C. § 175 was appealable pursuant to collateral order doctrine). Two subsequent Ninth Circuit panels, however, concluded that orders denying counsel were not appealable when the pro se plaintiff was seeking relief under § 1983. See Wilborn v. Escalderon, 789 F.2d 1328 (9th Cir. 1986); Kuster v. Block, 773 F.2d 1048 (9th Cir. 1985). The panel in Wilborn concluded that it was not in conflict with Bradshaw because Bradshaw involved Title VII litigants who are "presumptively incapable of properly handling the complexities involved in Title VII cases." 789 F.2d at 1330 n.2. As the Eighth Circuit noted in Slaughter v. City of Maplewood, however, it is impossible to "discern any sensible reason for basing the appealability determination on whether a civil rights plaintiff brought a Title VII suit as opposed to a § 1983 suit." 731 F.2d at 589. Section 1983 plaintiffs with complicated claims are not by virtue of the statute under which they seek relief any more capable of handling complex federal litigation without a lawyer than Title VII plaintiffs. The Ninth Circuit en banc has not resolved this quandary.

The Third Circuit held in Ray v. Robinson, 640 F.2d 474 (3rd Cir. 1981) that an order denying counsel to a pro se litigant is immediately appealable pursuant to the collateral order doctrine. Two members of a subsequent panel disagreed with this holding and concluded that such orders were not appealable over a strong dissent which argued that Ray v. Robinson controlled until overruled by the court en banc. See Smith-Bey v. Petsock, 741 F.2d 22 (3rd Cir. 1984). The Third Circuit en banc has not considered this issue.

The Seventh Circuit has also experienced a split among panels over this issue without a decision by the court en banc conclusively settling the matter. Compare Jones v. WFYR Radio/RKO General, 626 F.2d 576 (7th Cir. 1980) with Randle v. Victor Welding Supply Co., 664 F.2d 1064 (7th Cir. 1981). Although the court in Randle circulated its opinion among all judges of the Seventh Circuit without enlisting more than one judge in favor of the rehearing en banc, 664 F.2d at 1067 n.6, that case still leaves unresolved the split by two panels among the same circuit.

The Second Circuit in Miller v. Pleasure, 296 F.2d 283 (2nd Cir. 1961) (Miller I) held that an order denying counsel to a pro se litigant proceeding in forma pauperis was appealable pursuant to § 1291. A different Second Circuit panel declined in 1970 to follow the original decision in Miller I. Miller v. Pleasure, 425 F.2d 1305 (2nd Cir. 1970) (Miller II). But a subsequent panel indicated that the Miller I decision was still applicable in the Second Circuit. United States v. Birrell, 482 F.2d 890 (2nd Cir. 1973). Recently a Second Circuit panel has characterized Birrell as "erroneous" and explicitly reaffirmed Miller II as the law of the circuit. Welch v. Smith, 810 F.2d 40 (2d Cir. 1987). But the Second Circuit en banc has not addressed the issue.

With four judges dissenting, the Sixth Circuit is the only circuit to rule en banc on this issue. It reversed an earlier panel decision which had held that orders denying appointment of counsel before final disposition of the case are appealable under § 1291. Henry v. City of Detroit Manpower Department, 763 F.2d 757 (6th Cir.) (en banc), cert. denied, ___ U.S. ___, 106 S.Ct.

604, 88 L.Ed.2d 582 (1986).[2] Justice White, with whom Justice Blackmun joined, dissented from the denial of certiorari in Henry because of the need "to resolve the conflict among the Courts of Appeals on this plainly recurring question." 106 S.Ct. at 604, 88 L.Ed.2d at 582.

Only the First and Tenth Circuits have consistently held that orders denying counsel are not appealable pursuant to § 1291 before final disposition of the case in the district court. See Appleby v. Meechum, 696 F.2d 145 (1st Cir. 1983); Cotner v. Mason, 657 F.2d 1390 (10th Cir. 1981). But even though the holding in these cases agrees with the conclusion of the Fourth Circuit, the reasoning employed by both circuits to arrive at that conclusion is at variance with the Fourth Circuit's reasoning, demonstrating once again the confusion on this issue among the courts of appeals. In Cotner, for example, the court concluded, in contrast to the Fourth Circuit's decision, that an order denying appointment of counsel conclusively determined the disputed issue and resolved an important issue completely separate from the merits of the action. 657 F.2d at 1391. It rested its decision on the third criterion, whether the order was effectively unreviewable on appeal from a final judgment. Id. Similarly, the First Circuit in Appleby v. Meechum held that an order denying appointment of counsel failed to satisfy only the third criterion of the collateral order test. 696 F.2d at 148.[3]

The most recent circuit court decisions concluding that an order denying appointment of counsel is not immediately appealable have relied on a series of decisions by this Court beginning with Firestone which concern the appealability of an order disqualifying counsel. See e.g., Richardson-Merrell, Inc. v. Koller, __ U.S. __, 105 S.Ct. 2757, 86 L.Ed.2d 340 (1985). In Richardson-Merrell, this Court concluded that an order disqualifying counsel in a civil case was not immediately appealable pursuant

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[2]Henry involved appeals from both Title VII and § 1983 cases and made no distinction between those cases.

[3]Only the Eleventh and D.C. Circuits have not issued published opinions directly addressing the question presented in this petition.

to the collateral order doctrine. The considerations underlying the question of whether an order disqualifying counsel is appealable, however, are vastly different from the considerations underlying the question of whether an order denying appointment of counsel under 28 U.S.C. § 1915(d) is appealable. In the first situation the litigant presumably can hire alternative counsel, but it is clear in the latter situation that the pro se litigant will not have any legal representation.

This Court has recognized that "in deciding the question of finality the most important competing considerations are 'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" Gillespie v. United States Steel Corp., 379 U.S. 148, 152-53 (1964). The inconvenience of piecemeal review is the same in the disqualification context as in the context of denying counsel. But the danger of denying justice by delay is vastly different. It is because this danger is so great in the denial of counsel context[4] (but relatively minor in the disqualification context) that an order denying appointment of counsel should be held effectively unreviewable and appealable as a final collateral order. Indeed, the two circuits that have consistently held such orders appealable have continued to do so after this Court's decision in Richardson-Merrell. See Jackson v. Dallas Police Department, 811 F.2d 260 (5th Cir. 1986); Sours v. Norris, 782 F.2d 106, 107 (8th Cir. 1986).

The number of published decisions on this issue demonstrate that it frequently recurs.[5] And the variety of answers given to the same question demonstrates a profound confusion among the courts of appeals on this issue. This Court should therefore issue a writ of certiorari to review the decision of the Fourth Circuit in order to provide the lower federal courts with

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[4] See e.g., Robbins v. Maggio, 750 F.2d at 412-413; Bradshaw v. Zoological Society of San Diego, 662 F.2d at 1311-1319; Hudak v. Curators, 386 F.2d at 186. See also pp. 11-13 infra.

[5] The published decisions are in all likelihood the tip of an iceberg. Since the appeals in all but a few instances would involve a pro se appellant, they would be most often resolved by way of unpublished per curiam decisions.

guidance and to resolve the conflict among the courts of appeals on this plainly recurring question.

II. THE DECISION BELOW THREATENS TO HAVE A SIGNIFICANT ADVERSE IMPACT ON THE ENFORCEMENT AND EFFECTIVENESS OF OUR CIVIL RIGHTS LAWS.

The Fourth Circuit's decision threatens to weaken our civil rights laws by making the enforcement of a strong civil rights claim by indigent litigants far more difficult. Many civil rights violations are committed against the poor and imprisoned who are unlikely to locate counsel. Barriers to meritorious claims initiated by pro se litigants, therefore, serve as barriers to the effective enforcement of the civil rights laws, and to the development of those laws through the federal courts.

Pro se civil rights litigation, especially prisoner litigation, has blossomed in recent years. Prisoners' grievances now account for seven percent of the case load in federal district courts nationwide, and twelve percent of the case load in the courts of appeals. Hanson, "What Should Be Done When Prisoners Want to Take the State to Court," 70 Judicature 223 (1987). Little over twenty years ago, however, only 218 prisoner § 1983 suits were filed. Turner, "When Prisoners Sue: A Study of the Prisoner Section 1983 Suits in the Federal Courts," 92 Harv.L.Rev. 610, 611 (1979) (hereinafter "Turner"). This increase in mainly pro se civil rights litigation has had a significant impact on the respect shown for civil rights laws by prison systems. See Turner, supra, at 639. As William Turner states, federal court review may:

> reduce some of the abuses and ameliorate some of the conditions that cause prisoners to file lawsuits. The historical absence of such scrutiny meant that institutional intrusions on individual liberties went unquestioned. The current rash of § 1983 suits is a reaction to this exemption from the rule of law. It is also an opportunity to develop mechanisms for both fair and efficient resolution of prisoner grievances, in prison and in court.

Turner, supra at 657.

Even though pro se civil rights litigation has aided significantly in the enforcement and development of our civil rights laws, the thousands of civil rights claims brought by indigent pro se litigants each year create a grave risk that the courts will overlook a strong claim. See e.g., Turner, supra at 638 and n.141. The erroneous denial of counsel multiplies the risk that a

meritorious claim will be lost in a sea of frivolous claims. An erroneous denial of appointment of counsel is only erroneous if the pro se litigant has a meritorious claim and is incapable of prosecuting the claim without legal assistance. See e.g., Gordon v. Leeke, 574 F.2d 1147 (4th Cir.) cert. denied, 439 U.S. 970 (1978). Thus an erroneous denial of counsel, by its very nature, puts those litigants with the strongest claims and the least ability to prosecute them in a position where they are most likely to abandon the claim, unreasonably compromise it, or confuse and obfuscate it beyond recognition. Only by appellate review at an early stage can the substantial risk of losing a good claim be reduced by timely identification of meritorious but complex claims, and timely appointment of counsel for those claims, before they are lost or hopelessly confused.

The Fourth Circuit's decision, however, threatens to render the successful prosecution of a strong civil rights claim by an indigent who is erroneously denied counsel almost hopeless. Especially when the indigent litigant is incarcerated, the erroneous denial of counsel in all probability would result in the failure to gather evidence necessary, and put the evidence in the appropriate form, to survive a motion for summary judgment. Thus left without a strong record, and still without counsel, it is unlikely that the pro se litigant would have the ability to prosecute a successful appeal. See Robbins, 750 F.2d at 412. "Indeed, there remains a great risk that a civil rights plaintiff may abandon a claim or accept an unreasonable settlement in light of his own perceived inability to proceed with the merits of the case . . ." Id. "[T]he potential loss of a claim by a pro se civil rights litigant involves an 'asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial.'" 750 F.2d at 413 (quoting Firestone, 101 S.Ct. at 675). See also Bradshaw, 682 F.2d at 1311-18.

Even in the unlikely event that the indigent litigant succeeded in obtaining a reversal of the final judgment because of an erroneous denial of counsel, he may have won a Pyrrhic victory. The conduct of discovery and trial by a pro se litigant without benefit of counsel may well shape the record

in ways that cannot be corrected even by a second trial with counsel. Privileged information may have been brought to light, tactics shaped and arguments advanced that cannot be extirpated from a new trial. Witnesses may be lost and information once discoverable may be forgotten by the time counsel is finally appointed for a second trial. In short, a violation of the civil rights laws may be left unremedied because of the delay in appointing counsel.

Timely provision of counsel, on the other hand, serves the purpose of achieving justice in meritorious claims. See Turner, supra at 813. Timely provision of counsel also contributes to more efficient court administration as court personnel are spared the time-consuming tasks of deciphering prisoner communications, dealing with inappropriate motions or other demands, and generally managing cases. Id.

Because of the vast number of pro se civil rights litigants, the impact of the Fourth Circuit's decision, and the decision of those circuits agreeing with the Fourth, on the effective enforcement and development of our civil rights' laws is substantial. Therefore, this Court should issue a writ of certiorari to review the decision of the Fourth Circuit and determine whether that decision's adverse impact of the effectiveness of the civil rights laws should be allowed to stand.

CONCLUSION

Because the question presented here has split and confused the courts of appeals and because its resolution will have a significant impact on the effective enforcement of our civil rights laws, this Court should issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 19th day of June, 1987.

By: John J. Butler

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Attorney for the Petitioner

CERTIFICATE OF SERVICE

I, John J. Butler, attorney for the petitioner, hereby certify that I served a copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit on all parties required to be served by Rule 28.3 of the Supreme Court Rules by depositing a copy into the United States Mail, first class postage pre-paid, addressed to the following:

Allen R. Gitter, Esq.
Guy F. Driver, Jr., Esq.
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and

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Post Office Box 2800
Durham, North Carolina 27705

This the 19th day of June, 1987.

John J. Butler

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-6664

JAMES HENRY MILLER, Appellant,

and

OLLIE J. MILLER, Plaintiff,

versus

R. D. SIMMONS, Detective; and R. W. LEARY, Sheriff and his Deputy Sheriff Jailers in/for Durham, NC, Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Durham. Frank W. Bullock, Jr., District Judge; F. Trevor Sharp, United States Magistrate. (C/A C-84-1141-D)

Argued: November 14, 1986 Decided: March 26, 1987

Before PHILLIPS and CHAPMAN, Circuit Judges, and MAXWELL, United States District Judge for the Northern District of West Virginia, sitting by designation.

John J. Butler (Sanford, Adams, McCullough & Beard on brief) for Appellant; William McBlief (Guy F. Driver, Jr.; Womble, Carlyle, Sandridge & Rice; Brenda M. Foreman; Faison, Brown, Fletcher and Brough on brief) for Appellees.

MAXWELL: District Judge

In this civil rights action, filed pursuant to 42 U.S.C. § 1983[1] on November 28, 1984, Plaintiffs allege that Defendants were deliberately indifferent to a serious medical need of Plaintiff, James H. Miller, [Miller] while he was incarcerated in the Durham County, North Carolina jail, October 3-19, 1984, inclusively.

On July 15, 1985 Miller filed his motion for appointment of counsel pursuant to 28 U.S.C. § 1915(d)[2] and 18 U.S.C. § 3006A(g).[3] On August 29, 1985 the United States Magistrate denied Miller's motion. Miller then filed notice that he intended to appeal the magistrate's denial of his motion for court-appointed counsel. By Order entered December 27,

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[1]42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[2]28 U.S.C. § 1915(d) provides as follows:

> The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

[3]While 18 U.S.C. § 3006A(g) provides for appointment of attorneys for persons who are subject to revocation of parole, in custody as a material witness, or seeking federal habeas corpus relief, that section contains no provision for appointment of counsel presented under 42 U.S.C. § 1983.

1985 the district court found that an interlocutory appeal would be frivolous and not taken in good faith, and denied Miller's request to proceed with his appeal in forma pauperis. Because the immediate appealability of orders denying appointment of counsel in civil cases is an undecided issue in this Circuit,[4] this matter was scheduled for briefing and oral argument.

Orders denying motions for appointment of counsel are not, prior to final disposition of the case in the district court, "final decisions" of district courts as contemplated by 28 U.S.C. § 1291. Moreover, it is the view of this court that these orders are not within the parameters of the narrow exception to § 1291, articulated in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949) and amplified by its progeny.[5] Accordingly, the instant appeal is dismissed for lack of jurisdiction.

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[4]Six Circuits have held that such orders are not immediately appealable: Henry v. City of Detroit Manpower Department, 763 F.2d 757 (6th Cir.) (en banc), cert. denied, ____ U.S. ____, 106 S.Ct. 604 (1985), vacating Henry v. City of Detroit Manpower Department, 739 F.2d 1109 (6th Cir. 1984); Smith-Bey v. Petsock, 741 F.2d 22 (3d Cir. 1984); Appleby v. Meachum, 696 F.2d 145 (1st Cir. 1983); Randle v. Victor Welding Supply Co., 664 F.2d 1064 (7th Cir. 1981), overruling Jones v. WFYR Radio/RKO General, 626 F.2d 576 (7th Cir. 1980); Cotner v. Mason, 657 F.2d 1390 (10th Cir. 1981); Miller v. Pleasure, 425 F.2d 1205 (2d Cir.), cert. denied, 400 U.S. 880 (1970), overruling Miller v. Pleasure, 296 F.2d 283 (2d Cir. 1961), cert. denied, 370 U.S. 964 (1962).

Four Circuits have held that such orders are immediately appealable: Robbins v. Maggio, 750 F.2d 405 (5th Cir. 1985); Slaughter v. City of Maplewood, 731 F.2d 587 (8th Cir. 1984); Brooks v. Central Bank of Birmingham, 717 F.2d 1340 (11th Cir. 1983); Bradshaw v. Zoological Society of San Diego, 662 F.2d 1301 (9th Cir. 1981).

[5]See Flanagan v. United States, 465 U.S. 259, 104 S.Ct. 1051, 79 L.Ed.2d 288 (1984); Firestone Tire & Rubber Co., v. Risjord, 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981); Coopers & Lybrand v. Livesay, 437 U.S. 463, 98 S.Ct. 2454, 57 L.Ed.2d 351 (1978).

I.

James H. Miller, a sixty-nine year old Caucasian male with a history of heart problems, was arrested on October 2, 1984 by Durham City Police Detective R. D. Simmons and transported to the Durham County Jail in Durham, North Carolina. At the time of Miller's incarceration his medication was inventoried and then administered to him by jailers at that facility on a daily basis beginning on the day after his arrest. Miller has alleged that on the day he was brought to the Durham County jail he suffered chest pains and that he requested to see a doctor. He has also alleged that he requested medication, but that these requests were denied.

Miller has alleged that he spent twelve days in the Durham County jail before a physician came to see him; that the physician determined that he needed additional medication; and, that four days later he was transferred to the Central Prison Hospital where his previous drug intake was diagnosed as excessive.

Miller subsequently brought this action pursuant to 42 U.S.C. § 1983 against Detective Simmons, Durham County Sheriff R. W. Leary, and the Deputy Sheriff Jailers for Durham County, North Carolina, alleging that they were deliberately indifferent to his medical needs.

II.

In this appeal we are presented with two questions: (1) whether the Order denying Plaintiff's motion for appointment of counsel is an immediately appealable order, and if so, (2) whether the magistrate's decision to deny appointment of counsel was appropriate. Inasmuch as the Court concludes that an order denying appointment of counsel in a

civil rights case is not immediately appealable, it is neither timely nor necessary to address the second question.

28 U.S.C. § 1291 provides that Courts of Appeals shall have jurisdiction over "all final decisions of district courts...except where a direct review may be had in the Supreme Court." (Emphasis supplied). Generally, this language has been interpreted to mean that an appeal under this section may not be taken until there has been "a decision by the District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351, 357 (1978)(quoting Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633, 89 L.Ed. 911, 916 (1945)); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 373, 101 S.Ct. 669, 673, 66 L.Ed.2d 571, 578 (1981).

Clearly, the Order appealed from in the instant case fails to satisfy this rule. The Order at issue simply denies Miller a mere request in the on-going prosecution of a claim, the disposition of such intervening request Congress clearly left to the discretion of the district courts. The refusal to appoint counsel early-on, while it may make proceeding somewhat more burdensome for a pro se litigant, does not end the litigation on the merits. Moreover, such preliminary order does not foreclose future consideration by the trial court of the appropriateness of appointment of counsel as facts and circumstances dictate. As employed in the litigation before this court, the Order was one of a series of the magistrate's directives entered "in order to permit the litigation to progress as contemplated by the Federal Rules of Civil Procedure." The pro se litigant remains free to employ counsel

to prosecute his claim, to present his claim to the Court on his own, or to renew his motion for appointment of counsel at a later time.

In Cohen the Supreme Court has defined a narrow exception to the generally accepted rule that an appeal under 28 U.S.C. § 1291 must await final judgment on the merits. Inasmuch as the litigation from which the present appeal arises has not yet reached final judgment, the Order denying Miller's Motion for Appointment of Counsel is reviewable only if it falls within the Cohen exception.

In opening a narrow door to the appellate courts, "Cohen did not establish new law: rather, it continued a tradition of giving § 1291 a 'practical rather than a technical construction.'" Firestone, 449 U.S. at 375, 101 S.Ct. at 674, 66 L.Ed.2d at 578-79 (quoting Cohen, 337 U.S. at 546, 69 S.Ct. at 1226, 93 L.Ed. at 1536). Moreover, the Cohen exception, as developed, operates to preserve a number of important policy considerations encompassed in the finality requirement of § 1291.[6]

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[6]The Supreme Court has enumerated the important purposes served by requiring a party to raise all claims of error in a single appeal following final judgment on the merits:

> It emphasizes the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial. Permitting piecemeal appeals would undermine the independence of the district judge, as well as the special role that individual plays in our judicial system. In addition, the rule is in accordance with the sensible policy of "avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise, from its initiation to entry of judgment."

(Footnote Continued)

Appellant contends that because this case fits within the narrow exception recognized by Cohen this Court should recognize jurisdiction and then reach the merits of the appropriateness of appointment of counsel in the case. The Court is not persuaded by the Appellant's argument.

The collateral order exception, as enunciated by the Supreme Court in Cohen and subsequently restated by that Court, requires that "[t]he order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Firestone, 449 U.S. at 375, 101 S.Ct. at 674, 66 L.Ed.2d at 379 (quoting Coopers, 437 U.S. at 468, 98 S.Ct. at 2458, 57 L.Ed.2d at 357-58). This Court's examination of each of these factors leads us to conclude, as has a majority of the circuits that have addressed this issue,[7] that orders denying motions for appointment of counsel in civil cases are not subject to interlocutory appeals.

III.

Under the first tier of the Cohen exception, the order from which appeal is sought must conclusively determine the disputed question. This first tier, "stated in Coopers as 'must conclusively determine the disputed question,' was restated in Firestone as 'the challenged order

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(Footnote Continued)
Cobbledick v. United States, 309 U.S. 323, 325 (1940). See DiBella v. United States, 369 U.S. 121, 124 (1962). The rule also serves the important purpose of promoting efficient judicial administration. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 170 (1974).
Firestone, 449 U.S. at 374, 101 S.Ct. at 673, 66 L.Ed.2d at 378.

[7] See supra note 4.

must constitute a complete, formal and, in the trial court, final rejection...of a claimed right...." Robbins v. Maggio, 750 F.2d 405, 415 (5th Cir. 1985) (citations omitted).

Appellant argues that the Order denying appointment of counsel in this case must be considered to be a conclusive order because it came almost a year after the complaint was filed and without indication as to whether the question of appointment of counsel could be reopened at a later date. Because of the policy considerations noted above, the Court is unwilling at this stage of the civil action to view the Order of the magistrate as one which conclusively determines the issue in question. Because the plaintiff's motion was denied without prejudice, this Court believes that the district court can reconsider, at a later time, in the exercise of its discretionary authority, that the appointment of counsel as a viable option, if in fact such is determined to be necessary.

Under the second tier of the Cohen exception the order must "resolve an important issue completely separate from the merits of the action."[8] The district court in the case before us did not decline to appoint counsel because it concluded that it did not have authority to do so in a civil rights case. In the case before us the district court exercised its discretion and concluded that the plaintiff did not, at

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[8] Coopers, 437 U.S. at 468, 98 S.Ct. at 2458, 57 L.Ed. 2d at 357-58. In Coopers the Court held that a district court order denying the plaintiff's request for class certification was not immediately appealable because, inter alia, "the class determination generally involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" Coopers, 437 U.S. at 469, 98 S.Ct. at 2458, 57 L.Ed.2d at 358 (quoting Mercantile Nat. Bank v. Langdeau, 371 U.S. 555, 558, 83 S.Ct. 520, 522, 9 L.Ed.2d 523, 526 (1963)).

the present stage in the development of the civil action, need assistance of court-appointed counsel in presenting what the Court viewed as noncomplex factual issues of the case. In reaching the question of whether the Court below properly exercised its discretion in declining to appoint counsel for the plaintiff, this Court would necessarily become "enmeshed" in the consideration of issues which are not wholly separate from the merits of the case; thus, the second tier of the Cohen exception is not met in this appeal.

The ultimate effect of the exercise of discretion by the district court in declining to appoint counsel cannot be fairly and adequately assessed until the substance of the entire case is known. Under Section 1915(d) a plaintiff does not have an absolute right to appointment of counsel.[9] In the district court a plaintiff must show that his case is one with exceptional circumstances.[10] Moreover, a plaintiff may succeed on appeal only if it can be shown that the absence of appointed counsel was so prejudicial that the denial amounted to a denial of fundamental fairness, an abuse of discretion on the part of the district court.[11] Were we to reach the merits of the substantive issue at this early juncture and consider whether a prejudicial exercise of discretion has occurred we would improperly overstep the role of a reviewing Court, take on a supervisory role, and become substantively involved in the district court's management of the case before it.

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[9]Bowman v. White, 388 F.2d 756 (4th Cir.), cert. denied 393 U.S. 891 (1968).

[10]Cook v. Bounds, 518 F.2d 779 (4th Cir. 1975).

[11]See Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984).

The third tier of the Cohen exception requires that for an order to be reviewable on interlocutory appeal, it must be effectively unreviewable on appeal from the subsequent final judgment entered in the case. Courts which have permitted interlocutory appeals under the reasoning of Cohen have indicated that the particular questions before them were too important and too independent of the cause itself to require delay until final disposition of the case in the district court. Randle v. Victor Welding Supply Co., 664 F.2d 1064 (7th Cir. 1981).[12] We do not view the issue here to be so fleeting or perishable that it cannot endure until the civil action is concluded and an appeal is taken.

In Firestone the Court restated this third tier as one which was not only "where denial of immediate review would render impossible any review whatsoever." Firestone, 449 U.S. at 376, 101 S.Ct. at 675, 66 L.Ed.2d 580 (quoting United States v. Ryan, 402 U.S. 530, 533, 91 S.Ct. 1580, 1582, 29 L.Ed.2d 85, 89 (1971)). It is not believed, in cases such as the one now before this court, that such orders are effectively unreviewable on final appeal. It is reasonable to believe that a pro se litigant who has the ability to perfect an immediate appeal upon denial of appointment of counsel by the district court would be equally able to raise denial of appointment of counsel should he be unsuccessful on the merits and take a final appeal in the matter. The Court can perceive no rights in this case which would be extinguished by the denial of an

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[12] In its Per Curiam Opinion the Randle panel points out that courts in so concluding "have failed to recognize that, unlike the question of security in Cohen, the Plaintiff's right to court-appointed counsel can be effectively reviewed after final judgment on the merits." Randle, 664 F.2d at 1065-66.

interlocutory appeal. The Appellant has not demonstrated that circumstances exist, which would preclude this pro se litigant from presenting his claim to this Court along with his appeal from the district court should the ultimate issues of his civil action not be resolved in his favor. Experience teaches that a pro se litigant will raise on appeal each and every issue resulting from an unfavorable ruling. If the district court's ruling is found to constitute prejudicial error, its judgment can be vacated and remedial measures can be ordered.[13] Thus postponement of review does not result in the effective denial of review; the minimal delay caused by requiring the district court's judgment to become final is not sufficient harm, if it be any at all, to bring this case within that limited scope of orders which are immediately appealable under Cohen.

IV

Accordingly, this Court holds that an order denying appointment of counsel upon motion made pursuant to 28 U.S.C. § 1915(d) is not reviewable by interlocutory appeal and remains available for review on appeal from the final judgment. Inasmuch as the finality requirement of 28 U.S.C. § 1291 is jurisdictional in nature, the instant appeal is dismissed for lack of jurisdiction.

DISMISSED.

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[13] See e.g., Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROL
DURHAM DIVISION

JAMES BERRY MILLER and OLLIE J. MILLER,	)	
Plaintiffs,	)	
v.	)	C-84-1141-D
R.D. SIMMONS and R.W. LEARY, in their individual and official capacities,	)	
Defendants.	)	

O-R-D-E-R

This action was filed on November 28, 1984. Plaintiffs proceed pro se in an action against defendants based upon the alleged indifference of defendants to a serious medical need of James B. Miller while he was incarcerated in the Durham County Jail from October 3, 1984 through October 19, 1984. The docket sheet shows that 44 separate pleadings have already been filed. Defendants have filed a motion for summary judgment. Plaintiffs have responded and have also filed motions to amend or supplement the complaint. Many of plaintiffs filings are both duplicative and unnecessarily voluminous. A review of the file demonstrates that this civil action is making little progress and is, instead, developing into a morass of paper that does not facilitate resolution of the dispute between the parties.

The Court enters the following directives in order to permit the litigation to progress as is contemplated by the Federal Rules of Civil Procedure:

(1) Plaintiffs' motions to amend or supplement the original complaint are all DENIED, except that plaintiffs' action against defendants shall be construed as brought against defendants in their individual capacities as well as their official capacities. Consequently, the caption of the action shall be as set forth herein above. Plaintiffs' further proposed amendments relate to conditions of confinement unrelated to plaintiffs' primary claim concerning alleged medical need. Plaintiffs' proposed supplemental complaint attempts to incorporate a number of other lengthy documents--a process that would hopelessly confuse this litigation. Trial of largely unrelated claims at one time would serve only to confuse the jury. Consequently, the Court will deny plaintiffs' motions to amend or supplement the complaint.

(2) Discovery shall proceed in this case until November 15, 1993. Defendant Leary's request for a protective order, filed August 19, is DENIED. Plaintiffs shall have an opportunity for discovery of facts before a ruling is made on defendants' motion for summary judgment. Plaintiffs are advised that interrogatories and requests for production of documents may be directed only to named parties--defendants Simmons and Leary. Accordingly, defendant Leary's additional motion for a protective order, filed August 23, is GRANTED. (In that motion, defendants request protection against interrogatories addressed to Jimmy L. Pearson, a person who is not a party to this lawsuit.)

(3) After the close of discovery, the parties shall have thirty (30) days in which to file motions for summary judgment.

These motions shall not attempt to incorporate earlier documents but shall contain a full statement of the parties' positions, along with all supporting documents. Responses to the motions for summary judgment shall be filed within thirty (30) days thereafter.

(4) Plaintiff's motion for appointment of counsel is DENIED. The legal and factual issues involved in a claim of deliberate indifference to a serious medical need, such as the one brought by plaintiffs, are not complicated. Further, plaintiffs have demonstrated a clear ability to prosecute this action in adequate fashion. Cf., Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978).

IT IS ORDERED ACCORDINGLY.

Paul Trevor Harris, United States Magistrate

August 29, 1989